

Decision 15-07-037 July 23, 2015

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Joint Application of Comcast Corporation, Time Warner Cable Inc., Time Warner Cable Information Services (California), LLC, and Bright House Networks Information Services (California), LLC for Expedited Approval of the Transfer of Control of Time Warner Cable Information Services (California), LLC (U6874C); and the Pro Forma Transfer of Control of Bright House Networks Information Services (California), LLC (U6955C), to Comcast Corporation Pursuant to California Public Utilities Code Section 854(a).

Application 14-04-013  
(Filed April 11, 2014)

And Related Matter.

Application 14-06-012

**DECISION ON MOTION TO WITHDRAW  
APPLICATION TO TRANSFER CONTROL**

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## **DECISION ON MOTION TO WITHDRAW APPLICATION TO TRANSFER CONTROL**

### **Summary**

Through this decision, we grant with conditions the motion of Comcast Corporation, Time Warner Cable Inc. Time Warner Cable Information Services (California), LLC (U6874C), Bright House Networks Information Services (California), LLC (U6955C), and Charter Fiberlink CA-CCO, LLC (U6878C)<sup>1</sup> to withdraw their merger Application, (A.) 14-04-013, and A.14-06-012.<sup>2</sup>

This proceeding is closed.

### **1. Background**

On April 11, 2014, Comcast Corporation (Comcast), Time Warner Cable Inc. (Time Warner), Time Warner Cable Information Services (California), LLC (TWCIS), and Bright House Networks Information Services (Bright House) filed an application for approval of the transfer of control of TWCIS and Bright House to Comcast. (Application (A.) 14-04-013.) TWCIS and Bright House are regulated entities licensed by the Commission through the issuance of a Certificate of Public Convenience and Necessity (CPCN). The Application was filed under § 854(a) of the Public Utilities Code (Pub. Util. Code) which provides, in relevant part, that transfers of control of regulated entities may only be made with the prior approval of the California Public Utilities Commission (Commission). The

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<sup>1</sup> Hereinafter, we refer to Comcast, Time Warner, TWCIS, Charter Fiberlink CA-CCO, LLC (Charter Fiberlink) and Bright House as Joint Applicants.

<sup>2</sup> We will refer to both transactions as a “transfer of control” to Comcast, although in the case of the Bright House transaction we acknowledge that Comcast describes it as an indirect and partial transfer.

Application also contained a brief analysis of the ways in which the Joint Applicants meet the factors set forth in Pub. Util. Code § 854(c).

Protests were filed on May 15 and May 19, 2014 by the following parties: Jesse Miranda, Center for Hispanic Leadership, the Los Angeles Latino Chamber of Commerce, the Orange County Interdenominational Alliance, the National Asian American Coalition (NAAC), the Ecumenical Center for Black Church Studies, Christ Our Redeemer AME Church, and the National Hispanic Christian Leadership Conference (collectively, Joint Minority Parties); the Commission's Office of Ratepayer Advocates (ORA); The Utility Reform Network (TURN); and The Greenlining Institute (Greenlining). Dish Network L.L.C. (DISH) filed a response to the Application on May 16, 2014.

Joint Applicants filed a consolidated reply to the protests and responses on June 9, 2014. A prehearing conference (PHC) was held on July 2, 2014. At the PHC, ORA and other intervenors reasserted the arguments in their protests that the Commission is obligated to review the entire merger of Comcast and Time Warner in California under Pub. Util. Code § 854(a), (b) and (c) as well as Section 706 of the 1996 Telecommunications Act.<sup>3</sup> Joint Applicants, in contrast, argued that this Commission's review of the merger is limited to reviewing only the two regulated entities for which the Commission previously issued a CPCN.<sup>4</sup> Joint Applicants stated that Pub. Util. Code § 710 precluded the Commission from regulating Voice Over Internet Protocol (VoIP) and Internet Protocol (IP) enabled services, which are the alleged services provided by Joint Applicants.<sup>5</sup>

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<sup>3</sup> *Pre-Hr'g Tr.* 28:15-30:21, July 2, 2014.

<sup>4</sup> *Pre-Hr'g Tr.* 23:28-28:11, July 2, 2014.

<sup>5</sup> *Id.*

Judge Bemserfer (or assigned Administrative Law Judge (ALJ)) and the assigned Commissioner issued a Scoping Memorandum by ruling on August 14, 2014, stating that this Commission may evaluate the broadband aspects of the merger between Comcast and Time Warner within the limited authority granted under Pub. Util. Code §§ 854 and 706(a) of the 1996 Telecommunications Act.<sup>6</sup> Specifically, Judge Bemserfer and the assigned Commissioner stated in the ruling that, “While Joint Applicants maintain that reliance on § 706(a) is precluded by § 710 of the Pub. Util. Code, § 706(a) provides the express delegation of authority allowed by § 710.”<sup>7</sup> Further, the Scoping Memorandum made a preliminary determination that evidentiary hearings (EH) were not necessary.

In relation to the current application, Comcast, TWCIS and Charter Fiberlink filed A.14-06-012 on June 17, 2014 to transfer a limited number of business customers and associated regulated assets of Charter Fiberlink to TWCIS. Comcast, TWCIS, Charter Fiberlink and Bright House filed a motion on August 20, 2014 to consolidate A.14-06-012 with A.14-04-013, the Comcast-Time Warner merger application. The assigned ALJ issued a Ruling on August 29, 2014 granting this motion and stated that the August 14, 2014 Scoping Memorandum Ruling would govern the consolidated proceeding.

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<sup>6</sup> *Scoping Memo and Ruling of assigned Commissioner and ALJ*, filed on August 14, 2014 (Scoping Memo).

<sup>7</sup> Pub. Util. Code § 710 states, in relevant part:

“The Commission shall not exercise regulatory jurisdiction or control over Voice over Internet Protocol or Internet Protocol enabled services **except as required or expressly delegated by federal law...**” (*Emphasis supplied*)

On September 16, 2014, ORA filed a motion: (1) to compel information and documents, including responses to the FCC data requests, (2) for the production of the information in a format consistent with Rules 1.13(b)(1) and 1.10(c) of the California Public Utilities Rules of Practice and Procedure (Rules), and (3) for a Ruling on the handling of confidentiality issues in this proceeding. In a Ruling issued on September 23, 2014, the ALJ found that ORA's motion did not identify specific or actual areas of dispute, or show that ORA had engaged in a good faith effort to resolve them. In addition, the ALJ ordered Joint Parties to produce confidential documents and documents subject to the Federal Communications Commission's (FCC) protective order and stated that such documents would be subject to the standard that defines the scope of confidentiality under Pub. Util. Code § 583. On October 1, 2014, ORA filed a motion to reconsider the ALJ's September 23, 2014 Ruling and another motion to change the proceeding's schedule due to Joint Applicants' failure to timely and completely comply with parties' data request. ORA's motion to change the schedule was supported by the following parties: California Emerging Technology Fund (CETF), TURN, Greenlining, NAAC, Center for Accessible Technology (CforAT), DISH, Media Alliance and the Writers Guild of America, West Inc. (Writers Guild).

On October 4, 2014, the ALJ suspended the proceeding and scheduled a Law and Motion Hearing on October 16, 2014 to resolve parties' discovery disputes. At the hearing, Comcast proposed and ORA, Greenlining and TURN accepted a document production arrangement using specified software where Comcast would pay for software and training. Regarding programming materials requested by ORA and other parties that were in dispute at the FCC,

the ALJ ruled that the FCC would decide this matter and ORA may determine whether to renew this part of its motion at a later date.

On November 26, 2014, the ALJ set a new briefing schedule whereby Joint Applicants were to file opening briefs on December 3, 2014, parties were to file Reply Briefs on December 10, 2014 and any motions for EH were to be filed on December 10, 2014. Briefs were required to include as attachments any admissible documents including prepared testimony, declarations and/or stipulations of facts by the parties. On December 10, 2014, only Joint Minority Parties filed a motion for evidentiary hearings. On December 12, 2014, the ALJ denied Joint Minority Parties' motion because the motion failed to identify any material factual issue for the resolution of which EHs are necessary. In addition, the ALJ provisionally admitted all attachments to expert declarations and/or briefs into the record. On December 16, 2014, Joint Applicants filed a motion for leave to file a reply to parties' Briefs. In an e-mail Ruling on December 23, 2014, the ALJ denied Joint Applicants' motion.

On February 13, 2015, the ALJ issued a proposed decision (PD) recommending that the Commission grant the applications at issue in this proceeding, subject to conditions intended to mitigate the harms that the PD identified would stem from the merger. Eleven parties or groups of parties<sup>8</sup> filed timely opening comments and nine parties or groups of parties<sup>9</sup> filed timely

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<sup>8</sup> CalTel, Dish Network, CforAT, CETF, the Greenlining Institute and Consumers Union (Jointly), the Joint Applicants, the Joint Minority Parties, Media Alliance, ORA, TURN, the Writer's Guild filed opening comments on the PD on March 5, 2015.

<sup>9</sup> CalTel, the CforAT, CETF, the Greenlining Institute and Consumers Union (Jointly), the Joint Applicants, the Joint Minority Parties, Media Alliance, ORA, and TURN filed reply comments on the PD on March 10, 2015.

reply comments on that original PD. In addition, the Commission held an all-party meeting on February 25, 2015 in the Commission's San Francisco building. A quorum of the Commission,<sup>10</sup> as well as most active parties to the proceeding, participated in this all-party meeting. On April 10, 2015, Commissioner Florio issued an alternate proposed decision (APD) recommending that the Commission deny the application, stating the transfer of control would not be in the public interest in California and the negative effects of the merger could not be mitigated effectively. Another all-party meeting, attended by Commissioners Peterman and Sandoval and parties to the proceeding, was held at the Commission's Los Angeles Office on April 14, 2015. The Los Angeles all-party meeting was recorded on video, which was made available to the public on the Commission's website.<sup>11</sup>

On April 24, 2015, Joint Applicants announced that they had terminated the proposed transfer of control and the agreement with Charter Fiberlink which was the subject of related proceeding A.14-06-012. Subsequently, on April 27, 2015, Joint Applicants filed a motion to withdraw their applications with the Commission and a motion to stay comments on Commissioner Florio's APD. In response to Joint Applicants' motion to stay, ORA, Greenlining, TURN, CforAT, Common Cause, Media Alliance and Writer's Guild (collectively, Joint Intervenors) filed an opposition to Joint Applicants' motion and requested that Commissioner Florio accept comments on the APD. Joint Intervenors

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<sup>10</sup> Commissioners Florio, Peterman, Randolph, and Sandoval attended some or all of the all-party meeting held at the Commission's office building in San Francisco on February 25, 2015.

<sup>11</sup> See, <http://cpuc.ca.gov/video/>.



recommended that the Commission still vote on the APD at the May 21, 2015 agenda in order to preserve the record and allow intervenors the ability to receive intervenor compensation. An e-mail Ruling by ALJ Bemserderfer on April 29, 2015 set a May 4 date for parties to file comments to the APD and a May 11 date for reply comments. On May 5, 2015, Joint Intervenors submitted a response to Comcast's motion to withdraw and recommended that if the Commission does not approve the APD, that the Commission only issue a decision approving the motion to withdraw subject to the following conditions: (1) Comcast, Time Warner and Charter Fiberlink must provide the Commission with copies of the responses to the FCC requests for information that they provided to ORA and Commission staff via online e-Discovery platforms on CDs or hard drives in a format that is readable and usable with standard software, such as Adobe Acrobat; (2) the Joint Applicants be required to file a written agreement that they will not contest, in any fashion, the right for intervenors to seek intervenor compensation for any work conducted in these consolidated proceedings, including but not limited to their work on the opening and reply comments on the APD, their responses to the motion to withdraw, as well as any subsequent filings parties might make in these proceedings; and (3) Joint Applicants be required to pay for the cost of ORA's expert. On April 29, the FCC granted a request by the Joint Applicants to withdraw the applications pending at the FCC regarding the merger between Comcast and Time Warner.<sup>12</sup>

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<sup>12</sup> We take official notice of the fact that on April 29, 2015, the FCC granted the request of Comcast Corporation, Time Warner Cable Inc., Charter Communications, Inc., and Midwest Cable, Inc. to withdraw the applications related to the merger between Comcast Corporation and Time Warner Cable Inc. and dismissed the relevant FCC proceeding.

## **2. Discussion**

### **2.1. Commission Authority to Act Following Withdrawal**

Joint Applicants state that because the transaction has been terminated at the FCC, the current proceeding is moot and the Commission's focus should rest solely on whether to grant the Joint Applicants' motion to withdraw, not on other issues that may pertain to the merits of the transaction or the public interest.<sup>13</sup>

What Joint Applicants are suggesting is that the Commission automatically grant the motion to withdraw. However, the Commission is obligated to determine based on the record whether the grant of the motion to withdraw is reasonable and in the public interest.

We note that since the time the Joint Applicants voluntarily filed their application with the Commission over a year ago, this proceeding has advanced significantly. The Commission and intervenors have expended significant time, effort, and cost to review the application's impact on California post-merger. Indeed, the Commission would have voted on a proposed decision or an alternate proposed decision at the May 11, 2015 meeting but for the Joint Applicants' motion to withdraw. Given the advanced stage of the proceeding at the time the respondents abandoned the proposed transaction and requested dismissal, it is reasonable for the Commission to consider the merits of whether

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<sup>13</sup> *Joint Motion of Comcast Corporation, Time Warner Cable Inc., Time Warner Cable Information Services (California), LLC (U6874C), Charter Fiberlink CA-COO, LLC (U6878C), and Bright House Networks Information Services (California), LLC (U6955C) for Reconsideration of Ruling Denying Motion to Stay Pending Deadlines*, filed on April 30, 2015 at 3.

to grant or deny the motion to withdraw based on the circumstances and the record before us.

## **2.2. Preservation of Documents for Future Proceedings**

Intervenors request the Commission to allow the future use of documents contained in the record of this proceeding.<sup>14</sup> In the time between the initiation of this proceeding on April 11, 2014 and Joint Applicants' motion to withdraw on April 27, 2015, parties have made voluminous filings containing thousands of documents. In some cases, parties have provided hundreds of thousands of separate pages of data and analysis related to the Joint Applicants' operations, facilities and other issues stated in the Scoping Memorandum.

Under Section 6252 of the California Government Code, "[p]ublic records include any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." Under Commission General Order (GO) 66-C, this definition includes documents received in evidence in Commission proceedings. Even evidence that includes confidential information, including filings made under seal, are considered public records "not open to inspection."<sup>15</sup>

In the current proceeding, parties provided large amounts of information relating to the issues examined in this proceeding that may also be relevant to future Commission proceedings. Such issues include, but are not limited to,

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<sup>14</sup> *Response of the Joint Intervenors to Motion of Joint Applicants to Stay Pending Deadlines*, filed on April 29, 2015 at 2; *Response of the Joint Minority Parties to the Joint Applicants' Motion to Withdraw*, filed on May 1, 2015 at 4.

<sup>15</sup> GO 66-C, § 2.

market power, consumer protection, service quality, and competition in the broadband market. Given that the documents received in this proceeding are public records, even if some are not open to public inspection, it is reasonable for the Commission to order the entire record of this proceeding, including documents under seal, be made available for use in relevant future proceedings. Those documents marked confidential shall bear the same designation in other proceedings, and shall be kept under seal unless and until the presiding officer in a later proceeding rules that they no longer require protection. Therefore, none of the parties' confidential documents shall be made available for public inspection without action to remove the confidentiality designation.

Joint Intervenors also urge the Commission to require Comcast, Time Warner and Charter Fiberlink to provide to the Commission's General Counsel or her designee, the Director of ORA or his designee, and the Director of the Commission's Communications Division or his designee a full and complete set of Joint Applicants' and/or their affiliates' responses to FCC discovery requests on hard drives or CDs in a format that is readable and usable with standard software, such as Adobe Acrobat.<sup>16</sup>

Joint Applicants argue that ordering the preservation of FCC Responses would abrogate the Non-Disclosure Agreements (NDAs) signed by parties to the proceeding and be inconsistent with the FCC protective order for the national transaction.<sup>17</sup> However, the Commission possesses its own authority, not

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<sup>16</sup> *Response of the Joint Intervenors to the Motion of Joint Applicants to Withdraw Applications*, filed on May 12, 2015 at 4.

<sup>17</sup> *Joint Applicants' Consolidated Reply Comments on Commissioner Florio's Alternate Proposed Decision*, filed on May 11, 2015 (Joint Applicants' APD Reply Comments).

hampered by parties' NDAs or limitations imposed by other Commissions, to require the production of documents.<sup>18</sup> The information requested has already been provided to the Commission's Legal Division, Communications Division, and ORA during the course of the proceeding via online e-Discovery databases controlled by Joint Applicants. The Commission earlier ruled that Joint Applicants could deviate from traditional discovery requirements and provide documents in suboptimal form via Relativity software due to the urgency for parties to receive the information and timely file briefs.<sup>19</sup> Currently, no such urgency exists. Therefore, we will order Comcast, Time Warner and Charter Fiberlink to provide to the Commission and ORA a full and complete set of the FCC Responses on hard drives or CDs in a format that is readable and usable with standard software, such as Adobe Acrobat.

Joint Applicants are concerned about the preservation of confidentiality. As noted above, documents marked confidential shall bear the same designation in other proceedings and shall not be made available for public inspection without action to remove the confidentiality designation. It is a misdemeanor for Commission staff to intentionally disclose information provided to it by a public utility or its subsidiary, affiliate, or corporation holding a controlling interest in it, absent a Commission order or pursuant to an order of the Commission or a commissioner in the course of a Commission proceeding.<sup>20</sup>

Preserving the entire record, including that portion of the FCC data production from Comcast, Time Warner and Charter Fiberlink, is desirable and

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<sup>18</sup> See, e.g., Pub. Util. Code §§ 311, 314, 581, 582, 583, 584.

<sup>19</sup> *Law and Motion Judge's Ruling on Motion to Compel*, filed on September 23, 2014 at 5.

<sup>20</sup> Pub. Util. Code § 583.

necessary in view of the recent announcement by Charter Fiberlink that it will seek to acquire Time Warner. To ensure that parties in future proceedings are aware that the record of this case is available for use in proceedings to which the information may be relevant, we will also order Comcast, Time Warner, and Charter Fiberlink and any of their affiliates to disclose the existence of the record here, and of this decision, in future proceedings initiated within two years of the issuance date of this decision.

### **2.3. Intervenor Contributions to the Development of the Record**

Intervenors filed protests, participated in two hearings and two all-party meetings, conducted extensive discovery on millions of pages of documents, and presented their positions in many hundreds of pages of briefs and reply briefs, with attached testimony, declarations and stipulations of facts. Based on the intervenors' analysis and development of the record, the Commission issued a proposed decision and an alternate proposed decision, both of which were commented upon extensively by parties. But for the Joint Applicants' motion to withdraw the merger application on April 27, 2015, the Commission would in all likelihood have voted to adopt either the proposed decision or the alternate proposed decision at the May 21, 2015 Commission meeting based on a fully developed evidentiary record.

Following an analysis of the evidence, the intervenors opposed approving the applications, claiming that the merged company would increase its market share to such an extent that it would cause significant adverse consequences and, therefore, not be in the public interest. Most of the intervenors further argued that no conditions could entirely mitigate the harm that would be created by the merger. Below, we summarize the intervenors' contribution to the proceeding.

### **2.3.1. Scoping Memorandum**

In the development of the issues in the Scoping Memorandum, intervenors contributed legal and technical analysis to the record. Intervenors urged the Presiding Officer and assigned Commissioner to adopt a broad public interest standard in reviewing the Application and look not just at the implications of the transfer for voice customers of TWCIS and Bright House but also at the implications of the proposed Merger for the cost and availability of broadband services in California. Joint Protestors<sup>21</sup> and Greenlining worried that the Merger would widen the so-called digital divide between affluent and poor communities by restricting access to broadband services and making them more expensive. TURN argued that Joint Applicants failed to demonstrate the claimed public benefits of the merger. In general, intervenors asked the Commission to adopt strict standards of review either by ruling that the Application is governed by Section 854(c), which requires that the change of control meet certain standards enumerated in the statute, or by looking to the Section 854(c) standards for guidance even if we conclude that the Application is governed by the less restrictive public interest standard of Section 854(a). In addition to these arguments by intervenors, ORA urged the Commission to rule that we have jurisdiction to investigate the implications of the Merger on broadband

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<sup>21</sup> Hereinafter, we refer to the following as Joint Protestors: Jesse Miranda Center for Hispanic Leadership, the Los Angeles Latino Chamber of Commerce, the Orange County Interdenominational Alliance, the NAAC, the Ecumenical Center for Black Church Studies, Christ Our Redeemer AME Church, and the National Hispanic Christian Leadership Conference.

deployment in California under Section 706 of the federal Telecommunications Act, citing to a recent decision of the D.C. Circuit on this topic.<sup>22</sup>

Based on arguments by intervenors and Joint Applicants, the Scoping Memorandum set the scope of the proceeding to include all issues relevant to the proposed merger's impacts on California consumers in order to inform this Commission's comments to the FCC, and determine whether any conditions should be placed upon a merged entity. The issues included, but were not limited to the following: an analysis of the criteria enumerated in Pub. Util. Code § 854(c); the implications of the merger for broadband deployment in California; and the public interest impact of the merger such as safety and reliability, consumer protection, build-out, service quality, verifiable efficiencies, and competition.

### **2.3.2. Parties' Position on the Effects of the Merger on Competition in the California Marketplace.**

In evaluating the effects of the merger on competition in California, intervenors relied on the testimony of ORA's expert Dr. Lee Selwyn to show that approval of the merger would result in competitive harms to California consumers.<sup>23</sup> The harm according to Dr. Selwyn would have been the elimination of another competitor in a market that already lacked competition.

TURN also argued that the proposed merger would harm competition in the residential consumer market and cited to the testimony of its expert witness, Dr. Susan M. Baldwin. While Dr. Baldwin acknowledged that Comcast and

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<sup>22</sup> *Protest of the Office of Ratepayer Advocates*, filed on May 19, 2014 at 8-10.

<sup>23</sup> (See Selwyn Declaration at 13-15, 19, 71, 88, 153.)



Time Warner did not compete in each other's market, she nonetheless stated in her testimony that the merger would still have had anti-competitive consequences.<sup>24</sup>

The Writers Guild also pointed to the anti-competitive harms of the merger and claimed that removing Time Warner as a potential competitor would harm benchmark competition, limit the chances of overbuilding, and reduce the quality of broadband offerings.<sup>25</sup>

Joint Minority Parties asserted that due to a lack of effective competition and a lack of government regulations, Americans are currently paying higher prices for slower Internet service than residents of other developed countries. According to Joint Minority Parties, the current transaction would hurt competition by forcing mergers among Comcast's competitors.<sup>26</sup>

ORA, TURN, Greenlining, Writers Guild, Media Alliance, and Joint Minority Parties also raised the concern that a combined Comcast and Time Warner would have enormous capacity to damage startup activity, online content, and new innovations through exploiting their terminating access monopoly power as a result of the post-merger entity's significant increase in market share.<sup>27</sup> DISH's opposition was based on the asserted negative impact that the merger would have on video programming and competing video

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<sup>24</sup> *Reply Brief of the Utility Reform Network* (TURN Reply Brief) filed on December 10, 2014 at 18.

<sup>25</sup> *Brief of the Writers Guild of America, West Inc.*, (Writers' Guild Brief) filed on December 10, 2014 at 13-20. See also Josh Lowensohn, "Comcast could mandate a monthly data cap on all customers in the next five years," *The Verge*, May 14, 2014.)

<sup>26</sup> Minority Parties' Reply Brief at 7.

<sup>27</sup> Selwyn Declaration at 13-15 .

providers by foreclosing or degrading their offered services, imposing discriminatory data caps, favoring content provided by Comcast affiliates, and withholding online rights from DISH.<sup>28</sup>

### **2.3.3. Parties' Position Concerning the Effects of the Merger on Special Access and Backhaul Services**

The California Association of Telecommunications Companies (CALTEL) addressed the harmful impacts that the proposed merger would have on the availability of special access and backhaul services.<sup>29</sup> Its expert, Ms. Sarah DeYoung, argued that the proposed merger would significantly diminish competitive choice in the market for wholesale inputs needed by CALTEL members and other Competitive Local Exchange Carriers (CLECs).<sup>30</sup>

### **2.3.4. Parties Positions Regarding Merger-Specific and Verifiable Efficiencies**

Greenlining, Consumers Union, and Media Alliance questioned Comcast's claims regarding merger specific efficiencies, especially as they related to California.

Greenlining and Consumers Union claimed that Joint Applicants' assertions of merger efficiencies were unverifiable, vague, selective,

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<sup>28</sup> *Brief of Dish Network Corporation in Opposition to Proposed Merger* (DISH Brief), filed on December 10, 2014 at 2.

<sup>29</sup> *Opening Brief of the California Association of Telecommunications Companies* (CALTEL Brief), filed on December 10, 2014 at 2.

<sup>30</sup> *Id.*, at 3; *Opening Brief of the California Association of Telecommunications Companies, Testimony of Sarah DeYoung* (DeYoung Testimony), filed on December 10, 2014 at 4.

not merger-specific and did not hold up to scrutiny.<sup>31</sup> Greenlining and Consumers Union pointed out, for example, that if the merger were approved, Time Warner customers would likely lose access to Lifeline and the ability to use Roku as an independent video programming platform.<sup>32</sup> In addition, Greenlining and Consumers Union claimed that past experience shows that the transaction would cause significant disruptions and substantial diversion of resources to integration efforts. Further, Greenlining and Consumers Union claimed that the proposed transaction would result in a combined company that maintained Comcast's insufficient commitment to diversity.<sup>33</sup>

Media Alliance asserted many of these same points and stated that the planned reductions in network operations and corporate overhead would likely result in significant job loss, with resulting costs to the California economy as workers relocated to other jobs in other industries.<sup>34</sup>

#### **2.3.5. Parties' Positions on Service Quality**

CforAT, Media Alliance, Greenlining and Consumers Union argued that the merger would bode poorly for broadband and voice customers because it represented a merger of companies that had an objectively poor track record in

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<sup>31</sup> *Reply Brief of the Greenlining Institute and Consumers Union* (Greenlining and CU Brief), filed on December 10, 2014 at 41.

<sup>32</sup> *Id.*, at 42.

<sup>33</sup> *Id.*, at 39; Stephanie Chen and Noemi Gallardo, *Supplier Diversity Report Card: Unexpected Achievements and Continuing Gaps* at 10 (June 2014), available at <http://greenlining.org/wp-content/uploads/2014/06/2014Supplier-Diversity-Report-Card-printer-friendly.pdf>.

<sup>34</sup> Reply Comments of the Media Alliance, filed on December 10, 2014 at 13.

providing customer service. Greenlining and Consumers Union asserted that the proposed transaction would not improve service quality for consumers.<sup>35</sup>

Media Alliance pointed out that the Customer Satisfaction Index ranked the Joint Applicants dead last in customer service benchmarks among hundreds of major US corporations.<sup>36</sup>

CforAT stated that to the extent Comcast had attempted to show that its service is “less bad” than others, Comcast had not affirmatively demonstrated that it can or would provide effective customer service following a merger.<sup>37</sup>

### **2.3.6. Parties’ Positions on the Effects of the Merger on California Consumers**

CETF, TURN, Greenlining, Consumers Union, Media Alliance, Writers Guild, CforAT, and Joint Minority Parties all commented on the inadequacies of the Internet Essentials (IE) program and the effect of the merger on California’s consumers.

TURN argued that Comcast’s promises of benefits to consumers were empty because they include no binding, enforceable commitments. TURN asserted that “Joint Applicants provide no commitments for any benefits to consumers aside perhaps from the notion that some benefits will trickle down.”<sup>38</sup> In regard to the IE program, TURN’s expert witness Ms. Baldwin referenced the

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<sup>35</sup> Greenlining and CU Brief at 31; Greenlining and CU Brief, Exhibit A.

<sup>36</sup> Reply Comments of the Media Alliance at 7.

<sup>37</sup> *Brief of the Center for Accessible Technology* (CforAT Brief), filed on December 10, 2014 at 20.

<sup>38</sup> TURN Brief at 20; *Reply Testimony of Susan M Baldwin* (Baldwin Reply Testimony), filed on December 10, 2014 at 32-33.

low numbers of participants in California, both in absolute and percentage terms.<sup>39</sup>

CETF filed comments primarily to provide the Commission with data on Comcast's IE performance in California and to request the Commission order significant program improvements.<sup>40</sup> Greenlining and Consumers Union claimed that extending the IE program to low-income customers in Time Warner's territory would not help educate consumers on using computers and the Internet.<sup>41</sup> Greenlining and Consumers Union pointed out that expanding Comcast's digital literacy training to current Time Warner customers would not likely result in a meaningful increase in digital literacy, particularly in light of the fact that Joint Applicants appeared unwilling to make a binding commitment to continue the IE program.<sup>42</sup>

CforAT asserted that the IE program had not effectively reached the disability community, which is not directly targeted and which has not been directly recruited for enrollment.<sup>43</sup>

Media Alliance's main criticism of the IE program was in the program's strong performance in the area of public relations and weak performance in relation to closing the digital divide.<sup>44</sup>

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<sup>39</sup> Baldwin Opening Testimony at 73.

<sup>40</sup> Comments of the California Emerging Technology Fund (Comments of the CETF), filed on October 19, 2014 at 4.

<sup>41</sup> *Opening Brief of Joint Applicants*, Exhibit A, Attachment A, John B. Horrigan, PhD, "The Essentials of Connectivity: Comcast's Internet Essentials Program and a Playbook for Expanding Broadband Adoption and Use in America," March 21, 2014 at 21.

<sup>42</sup> Greenlining and Consumers Union Brief at 26.

<sup>43</sup> CforAT Brief at 16; Declaration of Dmitri Belser (Belser Declaration), filed on December 10, 2014 at 5-7.

The Joint Minority Parties concurred with the issues raised above regarding the IE program and pointed out that the speeds offered by the IE program are inadequate. For example, while IE offers download speeds of 5 megabytes per second (Mbps), Comcast's nationwide average download speed is about 32 Mbps.<sup>45</sup>

**2.3.7. Parties' Positions on Broadband Deployment and Build-Out of broadband Networks to Unserved and Underserved Areas**

Greenling and Consumers Union asserted that Joint Parties' claims of upgrading Time Warner's customers was contradicted by the fact that Time Warner was already planning to speed up service in New York and Los Angeles to give its "standard" subscribers 50 Mbps download speed, higher than Comcast's standard 25 Mbps.<sup>46</sup> In addition, Greenlining and Consumers Union stated that the benefit the combined company would gain in being able to take further advantage of "network effects," by which the attractiveness of a product increases with the number of people using it, would come at the expense

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<sup>44</sup> Reply Comments of the Media Alliance at 5.

<sup>45</sup> *Id.*, at 14.

<sup>46</sup> *Id.*, at 43; Adi Robertson, *Comcast Has Very Bad Reasons for Wanting to Buy Time Warner Cable: Defending the Massive Takeover to the FCC Requires Some Leaps of Logic*, The Verge, April 9, 2014 <http://www.theverge.com/2014/4/9/5597074/inside-comcasts-shaky-fcc-defense-of-time-warner-cabletakeover>; See also D'Orazio, *supra* note 10; Time Warner Jan. 30, 2014 Press Release, *supra* note 101 ("Time Warner Cable customers in New York City and Los Angeles will be the first to benefit from major enhancements that will transform their service as they know it.").

of increasing barriers to entry and further entrenching Comcast's dominance in the broadband marketplace.<sup>47</sup>

### **2.3.8. Parties' Positions on Safety and Reliability**

CETF stated that its concerns with the merger relied primarily on the merger's impact on safety and reliability in California, especially as those impacts would affect disabled customers who are disproportionately low-income and highly dependent on effective, reliable and affordable telecommunications service. From CforAT's perspective, the public safety issue most implicated for residential customers of a potential merged entity was the availability and reliability of service in an emergency, particularly during a power outage. Unlike a standard telephone that has an independent power source, a cable phone requires a battery backup in order to work during a power outage. A phone that works during a power outage is especially important for members of the disabled community. CforAT claimed that deficiencies in Comcast's battery backup program would be harmful to consumers if the merger were to be approved.<sup>48</sup>

In short, all intervenors opposed the merger for the variety of reasons discussed above.

### **2.4. Intervenor Compensation is Appropriate**

As detailed in the foregoing procedural history, during the sixteen months that these consolidated proceedings have been open, the intervenors have set forth their positions in comments, testimony, and

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<sup>47</sup> *Id.*, at 46.

<sup>48</sup> CforAT Brief at 4.

documentary evidence, which resulted in a development of a full record. A proposed decision (PD) and an alternate proposed decision (APD) were prepared and circulated for comments. Intervenor made extensive comments on both the PD and the APD. The PD would have approved the license transfers subject to multiple conditions responsive to concerns raised by the intervenors regarding the potential adverse impact of the parent corporation merger on customers and suppliers of the merged entity. The APD would have denied the applications based on the same set of concerns.

As is the case in any Commission proceeding, under the Commission's rules and pursuant to Pub. Util. Code §§ 1801–1812, intervenors may request compensation for the costs associated with its “efficient and effective participation” in this proceeding. However, as is also the case in any Commission proceeding, we cannot prejudge in today's decision how the Commission may rule on any actual compensation request.

Further, we note that as part of the motion to withdraw, Joint Applicants have stipulated that they will not object to intervenors seeking reasonable compensation for their substantial contribution to these proceedings.<sup>49</sup>

## **2.5. Grant of the Motion to Withdraw**

We acknowledge that the abandonment of the merger transaction has rendered the applications moot. No more resources of the Commission or the parties should be expended in these proceedings. Accordingly, we grant the motion to withdraw.

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<sup>49</sup> Joint Applicants' APD Reply Comments at 2.



However, the work and contributions to the proceedings by the various parties through their efficient and effective participation should not disappear. Accordingly, despite the grant of the motion, the record for the proceeding shall be preserved for the reasons stated above in Discussion -Section 2.2.

### **3. Comments on Proposed Decision**

The PD of the ALJ in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code and comments were allowed under Rule 14.3 of the Commission's Rules of Practice and Procedure. Comments on the Proposed Decision were filed on July 7, 2015 by Joint Applicants, Joint Minority Parties and ORA and reply comments were filed on July 13, 2015 by Joint Applicants and Joint Minority Parties.

Joint Minority Parties supported adoption of the PD without modification.

ORA made four substantive comments on the PD, as follows:

1. The Commission should not grant the Joint Applicants' Motion to Withdraw without reaching the merits of the consolidated applications of the Joint Applicants to determine if the transaction is in the public interest. If the Commission grants the Motion to Withdraw then it should make the following modifications to the PD:
2. The PD should state that the scope of the Commission's review of the consolidated applications includes Section 706(a) of the 1996 Telecommunications Act and Northern California Power Agency (NCPA) v. CPUC. Under NCPA v. CPUC, the Commission is also required to make findings on the anti-competitive effects of the proposed transactions even if the Commission grants Joint Applicants' request to withdraw their applications.
3. The PD should order the Joint Applicants to reimburse ORA for the costs of ORA's consultant, Dr. Lee L. Selwyn

for the work done on the effects of the proposed merger on competition.

4. The PD should recognize ORA's substantive analysis conducted on service quality of Joint Applicant's broadband and voice communications.

We disagree with ORA that a finding on the merits of the application is appropriate in connection with the dismissal of an action that has been rendered moot by the abandonment of the underlying merger, especially in view of the fact that the proposed decision (PD) found the transaction, as modified by the PD's conditions, to be in the public interest while the APD found the transaction not to be in the public interest.

The scope of the proceeding already includes a review of the transaction pursuant to the authority granted to the Commission by Section 706(a) of the 1996 Telecommunications Act. Given that we are dismissing this action on the grounds of mootness, we decline to make findings regarding its effect on competition. ORA's argument that we must do so relies on *NCPA v. CPUC*, 5 Cal. 3d 370 (1971). That case holds that in determining whether or not granting an application is in the public interest, the Commission must take into account the anti-trust implications of the proposed transaction. In other words, a decision on the merits of an application that has anti-trust implications is inadequate unless it includes a discussion of those implications. But a decision approving a motion to withdraw an application on grounds of mootness is not a decision on the merits and no anti-trust review is required.

ORA has not identified authority requiring it to be compensated by Joint Applicants for its expert fees. In fact, ORA's response to the motion to withdraw indicates simply that "fairness requires the Joint Applicants to pay for the full

contract cost of ORA's expert." In support of this position, ORA points out that in prior proceedings it has entered into contractual arrangements with applicants who have agreed to pay the reasonable fees of ORA's experts. However, no such agreement was reached with Joint Applicants in this proceeding.

Although we decline to order Joint Applicants to pay Dr. Selwyn's fees we acknowledge, as requested by ORA, that Dr. Selwyn did significant work that was relied on by other intervenors as well as ORA and provided support for both the conditions imposed by the PD and the ultimate rejection of the transaction by the APD. We likewise recognize the work done by ORA on service quality issues.

In their comments, Joint Applicants ask the Commission not to require production of the entire Time Warner data production to the FCC or, in the event the Commission continues to require production of those data, that the PD clarify the confidentiality requirements that will be imposed on third party access to the data. They also acknowledge that a decision on the merits is not necessary to support requests for reasonable intervenor compensation. Finally, they ask that this decision include a more detailed description of the procedural posture of the case at the time the motion to withdraw was filed and they propose revised findings of fact and conclusions of law to reflect those differences.

We continue to require production of the entire Time Warner FCC filing so as to complete the documentary record in this proceeding and make it available for the next, similar proceeding. We recognize the confidentiality concerns of Joint Applicants and modify the PD accordingly. We also amend the procedural history as suggested by Joint Applicants to more accurately reflect the state of the proceeding at the time the motion for withdrawal was filed.

#### **4. Assignment of Proceeding**

Carla J. Peterman is the assigned Commissioner and Karl J. Bemederfer is the assigned ALJ in this proceeding.

#### **Findings of Fact**

1. The application of Comcast, Time Warner, TWCIS, and Bright House for the transfer of control of TWCIS and the Pro Forma Transfer of Control of Bright House, to Comcast was filed at the Commission on April 11, 2014, with an assigned proceeding number of A.14-04-013.

2. The application of Comcast, TWCIS and Charter Fiberlink for approval to transfer certain assets and customers of Charter Fiberlink to TWCIS was filed at the Commission on June 17, 2014, with an assigned proceeding number of A.14-06-012.

3. The assigned ALJ issued a Ruling on August 29, 2014 granting a motion by Comcast, TWCIS, Charter Fiberlink and Bright House to consolidate A.14-04-013 and A.14-06-012. The ALJ ruled that the August 14, 2014 Scoping Memorandum Ruling would govern the consolidated proceeding.

4. On April 27, 2015, Joint Applicants filed a motion to withdraw their applications for indirect transfers of control, citing the announcement that Comcast had terminated its agreement to acquire Time Warner as well as its agreement with Charter Communications Inc. for the exchange of cable and communications systems.

5. On April 29, 2015, the FCC approved the request of Joint Applicants to withdraw their pending merger applications.

6. The documents received as a part of the record in this proceeding, including documents filed under seal, are public records.

7. In order to participate effectively in this proceeding, intervenors spent substantial time reviewing documents filed by Joint Applicants as well as documents produced by Joint Applicants in response to discovery requests.

8. The record was closed before Joint Applicants filed their motion to withdraw. By ruling April 14, 2015, the ALJ had requested supplementation of the record by Joint Applicant no later than April 30, 2015. Further Commission proceedings were also anticipated, including at least on all-party meeting.

9. The Commission could have voted to adopt either the proposed decision or the alternate proposed decision no earlier than May 21, 2015 but the Joint Applicants' filed their motion to withdraw the merger application on April 27, 2015.

10. Comcast, Time Warner and Charter Fiberlink will continue business operations in California despite the merger's termination.

11. The Commission is not a signatory to the Non-Disclosure Agreement several parties signed during the course of this proceeding.

### **Conclusions of Law**

1. It is reasonable for the Commission to take action to preserve the record developed by parties participating in this proceeding and to ensure that the entire record of this proceeding be available for use in future proceedings to which they may be relevant.

2. Under Section 6252 of the California Government Code, public records include any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics.

3. Under Commission GO 66-C, the definition of public records includes documents received in evidence in Commission proceedings. Evidence that

includes confidential information, including filings made under seal, is considered to be a public record not open to inspection.

4. The Commission possesses its own, independent, authority to require the production of documents, irrespective of parties' Non-Disclosure Agreements or limitations imposed by other Commissions.

5. Granting Joint Applicants' motion to withdraw the applications is functionally equivalent to an order permitting any qualifying intervenor to seek compensation for its contributions to the proceeding.

6. The grant of the motion to withdraw does not preclude an intervenor from seeking intervenor compensation under Pub. Util. Code §§ 1801-1812; however, today's decision does not prejudice any intervenor's request.

## **O R D E R**

### **IT IS ORDERED** that:

1. The motion of Comcast Corporation, Time Warner Cable Inc., Time Warner Cable Information Services (California), LLC, Bright House Networks Information Services (California), LLC, and Charter Fiberlink CA-CCO, LLC to withdraw their merger application is granted subject to the following conditions.

2. The entire record of this proceeding, including confidential documents under seal, shall be available for potential use in future California Public Utilities Commission proceedings to which it may be relevant. Any intervenors who choose to retain confidential records and documents must maintain the confidentiality of such materials and may not release the records or documents or the information therein to any third party without an order of this Commission authorizing such release.

3. Any Joint Applicant, or its affiliates, shall disclose the existence of the record developed in this proceeding, and of this decision, in future proceedings initiated within two years of the effective date of this decision. Specifically, Applicants shall make such disclosure in any future proceeding in which they seek California Public Utilities Commission approval of a transaction under Public Utilities Code Section 854. If uncertain, Applicants shall err on the side of disclosure.

4. If a party desires to introduce confidential documents from this proceeding into the record of a different proceeding, that party may bring this decision to the attention of the presiding officer in that proceeding. It will then be within the presiding officer's discretion to determine whether such documents are appropriately identified and received as evidence.

5. Within 15 days of the effective date of this decision, Comcast Corporation, Time Warner Cable, Time Warner Cable Information Services (California) LLC, and Bright House Networks Information Services (Joint Applicants) shall deliver to the Commission's General Counsel or her designee, the Director of Office of Ratepayer Advocates or his designee, and the Director of the Commission's Communications Division or his designee, a hard drive or other digital medium containing Joint Applicants' data production to the Federal Communications Commission in connection with Comcast's proposed acquisition of Time Warner Cable Inc., absent the programming materials subject to an appeal to the DC Circuit. The documents on the hard drive or other digital medium shall be in a format that is readable and usable with standard software, such as Adobe Acrobat. The documents and information delivered according to this paragraph are subject to the same protections as in Ordering Paragraph 4.

6. Subject to the conditions imposed above, Application (A.) 14-04-013 and A.14-06-012 are closed.

This order is effective today.

Dated July 23, 2015, at San Francisco, California.

MICHAEL PICKER

President

MICHEL PETER FLORIO

CATHERINE J.K. SANDOVAL

CARLA J. PETERMAN

LIANE M. RANDOLPH

Commissioners